No. 91-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIACOM INTERNATIONAL, INC.,

Petitioner,

vs.

CARL C. ICAHN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1534—August Term, 1991

(Argued May 21, 1991 Decided October 9, 1991)

Docket No. 91-7174

VIACOM INTERNATIONAL INC.,

Plaintiff-Appellant,

—v.—

CARL C. ICAHN; ICAHN HOLDING; ICAHN CAPITAL CORP.; HERON INVESTORS PLAN INC.; ACF CORPORATION, INC.; UNICORN ASSOCIATES CORPORATION; GNU CORP.; EXCALIBER PARTNERS; HEALTH INVESTORS LIMITED PARTNERSHIP; LONGVIEW INVESTORS LIMITED PARTNERSHIP; HARMONIOUS ASSOCIATES LIMITED PARTNERSHIP; STORK ASSOCIATES LIMITED PARTNERSHIP,

Defendants-Third-Party-Plaintiffs-Appellees,

RALPH M. BARUCH; TERRENCE A. ELKES; KENNETH F. GORMAN; JOHN W. GODDARD; LEO CHERNE; JOSEPH F. CONDON; THEODORE C. JACKSON; ALAN R. JOHNSON; PAUL A. NORTON; HARRY M. PLOTKIN; NANCE C. REYNOLDS; JOHN F. WHITE,

Third-Party-Defendants-Appellees.

Before:

KEARSE, MAHONEY, and SNEED,*
Circuit Judges.

Appellant, Viacom International, Inc., filed a RICO suit against Carl Icahn and his associates alleging violations of the Hobbs Act and the securities laws. The United States District Court for the Southern District of New York, Robert P. Patterson, Jr., J., granted appellees' motion for summary judgment and dismissed appellant's case. The Court of Appeals, Joseph T. Sneed, J., affirmed the grant of summary judgment and concluded that Viacom was not injured by Icahn's activities.

MICHAEL E. TIGAR, Austin, Texas, (Stephen Lowey, Neil J. Selinger, John Mage, New York, New York, Lowey Dannenberg Bemporad & Selinger, P.C., Goodkind, Labaton & Rudoff, Wolf Popper Ross Wolf & Jones, New York, New York, of counsel), *for Plaintiff-Appellant.*

DENNIS J. BLOCK, New York, New York, (Stephen A. Radin, Beth J. Jacobwitz, New York, New York, Weil, Gotshal & Manges, New York, New York, of counsel), *for Defendants-Appellees.*

* Honorable Joseph T. Sneed, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

SNEED, *Circuit Judge*:

Plaintiff, Viacom International Inc. (Viacom), appeals from the district court's grant of summary judgment dismissing the plaintiff's case against defendants Carl Icahn (Icahn) and various corporations and entities controlled by Icahn. Viacom claims that Icahn committed extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1988), when Viacom was forced to repurchase Icahn's Viacom stock at a price that was significantly higher than current per share price on the open exchange. The district court concluded that the repurchase of the stock, commonly known as "greenmail," did not violate the Hobbs Act. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

As of May 1, 1986, Carl Icahn held slightly less than five percent of Viacom's stock. During this time, Icahn met with Joseph R. Perella, Viacom's investment banker at First Boston Corporation. Icahn indicated that he wanted Viacom to repurchase his shares. Perella communicated this information to Viacom.

On May 5, 1986, Icahn bought one million shares of Viacom stock from Ivan Boesky for $63 a share. Because Icahn now owned more than five percent of the company's stock, he had until May 15, 1986, to file form 13D with the Securities Exchange Commission (SEC), revealing his share ownership and detailing his intentions. Before the form had to be filed, Icahn further increased his holdings when he bought 1.5 million shares of Viacom stock for $70 a share from JMB Realty Corp. of Chicago.

On May 15, 1986, Icahn filed his form 13D with the SEC. In it, he stated that he owned almost seventeen percent of Viacom's stock. He said he was prepared to buy all of Viacom's stock for $75 per share. If no deal could be reached, Icahn indicated that he would continue to explore strategies for obtaining control of Viacom. He also suggested that he might dispose of his shares for "cash or otherwise."

During this time, Icahn also went public with his share holdings. There is evidence that the widespread perception of an imminent takeover adversely affected Viacom's business operations. Apparently, companies and individuals were reluctant to engage in certain contractual relations with Viacom because of the possibility that the company would soon be sold or broken up.

On May 21, 1986, Viacom repurchased all of Icahn's shares. Icahn received cash (equivalent to $62 per share), warrants to purchase 2.5 million shares of common stock, and ten million dollars worth of free advertising.[1] When the whole deal is added together, Icahn received approximately $79.50 for each share of Viacom stock. The actual share price on the open exchange on May 22 was $62. Icahn received a premium over that market price which totalled over sixty million dollars. As part of this deal, Icahn agreed not to purchase Viacom stock or seek control of the company for eleven years. Ten months later, Viacom was acquired by National Amusement, Inc., for $111 a share.

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1 The practice of forcing a company to repurchase a stockholder's stock at a premium above the current market price is commonly known as "greenmail." This is a practice commonly used by corporate raiders. They purchase a large chunk of stock and threaten to engage in a hostile takeover unless the company repurchases its shares for a premium.

On May 28, 1986, Viacom filed this suit alleging that Icahn and his affiliates had violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. The amended complaint filed on October 11, 1988, alleges that Icahn committed the requisite predicate acts required under RICO by engaging in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and by committing securities fraud in violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and rule 10b-5.

Specifically, Viacom alleges that Icahn's greenmail deal with Viacom constituted extortion. Viacom further alleges that Icahn has engaged in a pattern of extortion. Viacom points to other greenmail deals between Icahn and companies like B.F. Goodrich, Owens Illinois, and American Can Company. Viacom also alleges that Icahn violated the securities laws when he purchased stock in Saxon Industries (Saxon) and Hammermill Paper Company (Hammermill) and resold the stock back to the companies.

On September 14, 1990, in a published decision, Judge Robert P. Patterson granted defendants' motion for summary judgment. The court held that Icahn "did not obtain property from plaintiff to which they had no lawful claim and therefore did not commit extortion." *Viacom Int'l, Inc. v. Icahn*, 747 F. Supp. 205, 213-14 (S.D.N.Y. 1990). The court also dismissed plaintiff's securities claims because Viacom did not have standing to raise them. *Id.* at 210. Having dismissed the alleged predicate acts under RICO, the court dismissed the entire case. *Id.* at 214.

II.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction under 28 U.S.C. § 1291 (1988). The court reviews a district court's grant of summary judgment de novo. *See Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). The reviewing court applies the same standard of review as that applied by the district court. *See Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir. 1983). Under rule 56(c), summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Bryant*, 923 F.2d at 982. We view the record and the evidence in the light most favorable to the nonmoving party. *See id.*

III.

DISCUSSION

Without addressing whether Icahn may have violated the Hobbs Act or the securities laws, we affirm the district court's holding dismissing this case because we conclude that Viacom was not damaged by the transaction. While the district court's holding was based on other grounds, both parties argued the damages question in the court below and discussed it in the briefs filed with this court. We can clearly affirm on this ground. *See Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979) (noting that "[a]ppellees, as the prevailing parties, may of course assert any ground in support of that judgment 'whether or not that ground was relied upon or even considered by the trial court' " (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970))); *see also AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148, 152 (2d Cir.

1984) (same). By affirming the judgment of the district court on this ground, we are selecting what to us is the most direct route to that end.

Viacom effectively paid Icahn $79.50 for each of his three and half million shares. At the time of the deal, the stock was trading for $62 a share on the open exchange. To determine whether Viacom was injured, we must decide whether the $79.50 Viacom paid to Icahn exceeded the fair value of the stock.

Viacom points to the open market value and argues that $62 represented the fair value of the stock. Relying on the efficient capital market hypothesis, Viacom bases its damages on the seventeen dollar premium it was forced to pay for each share of stock. The efficient capital market theory holds that "because of the large number of skilled profit-motivated investors continuously analyzing all publicly available information concerning liquid publicly traded securities, the prices of those securities in the market fairly reflects the value of the securities." Joint Appendix at A495-96. Market price is considered "the most reliable indicator of the value of [Viacom's] shares" under this theory. *Id.* at A496.

We do not believe that market price is the only factor to be considered when determining the value of stock in a situation such as that before us. The efficient capital market theory clearly is not the sole means of determining value. *See Paramount Communications Inc. v. Time Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,277 (Del. Ch. Ct. July 14, 1989) (noting that the theory of a single, efficient capital market has not been given "the dignity of a sacred text" and concluding that directors, when valuating a stock buy-out, may operate on the theory that the stock market valuation is wrong). Deter-

mination of a stock's fair value is dependent on several factors. Market price is one of those factors but it is not the determining one. *See Multitex Corp. of Am. v. Dickinson*, 683 F.2d 1325, 1330 n.4 (11th Cir. 1982) (concluding that market price is not the sole criterion for determining the "fair value" of the stock). The court must also consider a host of other factors including net asset value and investment value. *See id.* at 1328-29; *see also Hunter v. Mitek Indus.*, 721 F. Supp. 1102, 1106 (E.D. Mo. 1989) (holding that the court must consider all relevant factors, including asset value, earnings, and every relevant fact and circumstance when determining the fair value of the stock).

In *Litton Indus. v. Lehman Bros. Kuhn Loeb Inc.*, 709 F. Supp. 438 (S.D.N.Y. 1989), the court said:

> "[C]ourts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or could be ascertained . . . and which throw any light on future prospects . . . must be considered . . . ."

Id. at 447 (quoting *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. Sup. 1950)). Moreover, directors may violate their fiduciary duty if they accept merger proposals based solely on market price without considering other factors that affect the company's inherent value. *See Smith v. Van Gorkom*, 488 A.2d 858, 875-76 (Del. 1985). Finally, each case turns on its own particular facts. No specific rules can be culled from the caselaw. *See Multitex*, 683 F.2d at 1329.

However, it can be said that the intensity of the purchaser's desire to acquire a large block of stock reason-

ably may exceed its price per share in the open market. *See Amsellem v. Shopwell, Inc.*, No. 5683, 1979 WL 2704 (Del. Ch. Sept. 6, 1979) (noting that a large block of stock may carry a higher price than the sum of its individual shares because of the control factor the block contains). A holder of such a block of stock is entitled to test the intensity of that desire by declining to sell at the price per share in the open market. So long as the parties search for that price at which the purchaser's value in use of the stock just exceeds that of the seller, the price so determined by that process does not exceed the relevant market price of that block. Unique goods sometimes fetch unique prices fairly and legitimately.

The specitic facts of this case persuade us that the price Icahn was paid for his tock was arrived at in this manner and that it was worth $79.50 a share at the time Icahn sold his stock to the company. Several days before this deal was reached, Icahn had offered to buy all the company's stock at $75 a share. Viacom's directors met and reviewed two reports, which had been specially prepared by two investment firms, that evaluated Icahn's offer. The report prepared by First Boston valued Viacom's stock at $90 to $100 a share. The second report from Donaldson, Lufkin & Jenrette, Inc. valued the stock at $88 to $100 per share. Joint Appendix at A854-55. The board of directors rejected Icahn's offer as "inadequate and inappropriate." *Id.* at A874. Various directors testified that they believed the fair value of Viacom's stock ranged anywhere from $80 to $100. *See id.* at A578-79, A60001, A620. One director acknowledged that market price was "among the least reliable indicators" of the value of Viacom's stock. *Id.* at 562.

Proof that these estimates were not wholly wrong consists of the fact that four months after Icahn sold his

shares to Viacom, a management led group offered to purchase the company for $81 per share. After a series of bids and counteroffers, National Amusements purchased the company for $111 per share seven months later.

These facts convince us that Viacom was not injured by the transaction it entered with Icahn. The directors themselves determined that the stock was worth more than $75 per share and refused to accept an offer at that price. Pointing to their legal obligation to examine all the relevant factors, they concluded that the stock was worth at least $80 per share. Some of those same directors later offered to buy the stock for $81 per share. The company cannot now complain that it was somehow injured when it paid less for the stock than it thought it was worth. They can only show an injury by insisting that the stock can only be valued at its price per share in the open market. We have rejected this measure in this case. We are convinced that the fair value of Viacom's stock exceeded $79.50 a share and that the company was not injured when it repurchased its stock from Icahn at that price.

While we recognize that the questions are different, it is worth noting that the district court implicitly recognized that Viacom was not injured when it concluded that Icahn obtained his deal through "hard bargaining" and did not receive a benefit to which he was not otherwise entitled by law. *See Viacom Int'l*, 747 F. Supp. at 213.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

MAHONEY, *Circuit Judge*, concurring in the judgment:

I agree with the majority that the judgment of the district court should be affirmed. I would not premise that affirmance, however, upon the proposition that there is no genuine issue of material fact posed by my colleagues' conclusion that "Viacom was not damaged by the transaction" with Icahn on May 21, 1986.

It is undisputed that the market price at which Viacom's common stock traded publicly on that date, when Viacom paid $79.50 per share for Icahn's holdings, was $62.00 per share. It may well be, as the majority concludes, that the real value of the stock on that date nonetheless exceeded $79.50 per share, and that the evidence marshalled by the majority in support of that conclusion should be regarded as persuasive. In my view, however, it falls short of establishing that proposition as a matter of law, which Fed. R. Civ. P. 56(c) requires for an award of summary judgment, particularly since "fairness of consideration is generally a question of fact." *Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979) (collecting cases).

I nonetheless agree that the summary judgment granted by the district court to defendants-appellees should be affirmed, because in my view plaintiffs-appellants have established no basis for RICO liability. Plaintiffs-appellants pled two predicate acts of securities fraud in violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1988), and rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1991); and a series of alleged violations of the Hobbs Act, 18 U.S.C. § 1951 (1988). Relying, *inter alia*, upon rulings in the Fourth and Eighth Circuits, *see International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 151-54 (4th Cir. 1987); *Brannan v. Eisenstein*, 804 F.2d 1041, 1045-46 (8th Cir. 1986), the district court

ruled that Viacom had no standing to assert the securities fraud claims under RICO because it was not a purchaser or seller of the securities in question. *See Viacom Int'l Inc. v. Icahn*, 747 F. Supp. 205, 210 (S.D.N.Y. 1990). The Third, Ninth, and Eleventh Circuits take the view, on the contrary, that a RICO plaintiff has standing if "injured in his business or property by reason of" a securities fraud within the meaning of 18 U.S.C. § 1964(c) (1988), whether or not a purchaser or seller. *See Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 285-86 (3d Cir. 1991); *Pelletier v. Zweifel*, 921 F.2d 1465, 1510 n.80 (11th Cir. 1991); *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1465-67 (9th Cir. 1990), *cert. granted on this question*, 111 S. Ct. 1618 (1991).

In any event, the securities fraud predicates in the amended complaint herein are alleged to have been perpetrated by Icahn against two entirely unrelated companies in 1979 and 1980. Viacom was neither a purchaser or seller in those transactions, and suffered no injury to its business or property as a result of them. Further, to the extent that Viacom asserts new theories of securities fraud on appeal, I would not entertain securities fraud claims that were not properly presented below. *See, e.g., In re Cooper/T. Smith (Abshire v. Gnots-Reserve, Inc.)*, 929 F.2d 1073, 1078 (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3109 (U.S. July 29, 1991) (No. 91-188); *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 49 (2d Cir. 1980); *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979); *Capps v. Humble Oil & Ref. Co.*, 536 F.2d 80, 82 (5th Cir. 1976). Finally, I am in essential agreement with the district court's analysis that Viacom's allegations of Hobbs Act violations are inadequate to state a claim. *See* 747 F. Supp. at 210-14. I accordingly join in the judgment of affirmance.

Hobbs Act, 18 U.S.C.

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

(June 25, 1948, c. 645, 62 Stat. 793.)

Racketeer Influenced and Corrupt Organizations Act

§ 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payment and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense

involving fraud connected with a case under title II, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value

at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any Department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, Stat. 2677).

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

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[1] So in original. Probably should be "subsection".

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

EDWARD L. ANDERSON, et al.,

Plaintiffs,

v. 85 Civ. 4215 (RJW)

CARL C. ICAHN, et al.,

Defendants.
----------x

February 4, 1987
4:15 p.m.

Before:

HON. ROBERT J. WARD,

District Judge

APPEARANCES

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PETER M. KREINDLER,
Of Counsel

(Case called; all parties ready)

THE COURT: I've had the opportunity to review the submissions and I think the first order of business is the propriety of the derivative action in terms of the demand on the board. As some of you are at least aware, I have written on this subject, although subsequent learning from the Court of Appeals in another matter indicated that there was some exception taken to some of the views that I expressed.

Let me, however, tell you how I see it. We start with Rule 23.1 of the Federal Rules of Civil Procedure. In relevant part that rule requires that the complaint allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors, and, if necessary, from the shareholders, and then he is to allege the reasons for his failure either to obtain the action or for not making the effort.

The defendant, in moving to dismiss the failure to make this demand which they contend is required, starts by citing some general policy arguments. I don't really put too much stock in those arguments but would turn next to the assertion that the plaintiffs have not pled with specificity the reasons such a

demand would be futile since the plaintiff has sued no board members, since Icahn has contracted to leave the board members alone for ten years and since a majority of the board is independent. As I understand the plaintiff's response, it is argued that the defendant or defendants, if you want to call them that, primarily Mr. Icahn, lack standing to raise the objection.

In the case to which I referred a few moments ago, I held that the general rule is that strangers cannot complain of a plaintiff's failure to make a demand. The defendants respond by relying on Third Circuit precedent. Needless to say, when one has spent the time that I spent in drafting a opinion — and you will recognize that one was not off the top of my head — I prefer to rely on my own precedent absent contrary precedent in this circuit or from the Supreme Court.

The plaintiffs point out to us that before filing suit Anderson sent a hand delivered letter to the board demanding that the board not enter into any buyback arrangements. That's set forth in the complaint, paragraph 75. Plaintiffs go on to argue that any further demand would have been futile since the board members were interested in and biased the transaction to preserve their perks.

In addition, plaintiff argues that the Viacom board impliedly acquiesced by filing an answer that did not raise it. I start by suggesting that this whole question of futility in the context of this lawsuit is a Federal question. Although what must be pled and with what particularity is not necessarily totally clear.

As I read the cases cited in Wright and Miller, the question is could any facts indicating futility be shown? Needless to say, this is an issue, as with so many others, where a determination of the sufficiency of allegations of futility depend upon the circumstances of the individual case. There is authority for that.

The authority is in Kastor v. Modification Systems, a case which can be found at 731 F.2d 1014, Second Circuit 1984 page 1018. The Court of Appeals noted that if the directors are

adversely interested the demand is presumtively futile, citing authority, and where allegations in the complaint permit the court to infer that the directors lack their requisite disinterestedness, a demand is not required. Even were we to dismiss, clearly the proper course, as in the Kastor case, which I mentioned a moment ago, would be to allow an amendment.

That gets us to a case which we will be talking about a bit this afternoon, Feinberg v. Carter, Judge Walker's case. We have some of the same cast of characters. I don't use that word pejoratively, involving the 1984 repurchase of Goodrich stock, that Mr. Icahn had required.

There Judge Walker denied the defendant's motion to dismiss for failure to make a demand, looking specifically for whether there is any business justification consistent with the challenged transaction. If the directors don't have any good reason, presumption of disinterestedness is reduced.

Judge Walker had found no such good reason to pay the premium and found as well that the directors had good reason to do it, to hold on to their various perks, their compensation, pension benefits and so on. That case has a distinction that I don't think we have here. In that case the board initially covered up the buyback. As you all know, Judge Walker certified the question under 1292 B.

I think at this stage, with that background, I should ask a couple of questions. Why don't I ask defendants to tell me why, in their view, Judge Walker's opinion is not persuasive?

MR. BLOCK: Anything Judge Walker says is persuasive, your Honor. I am Dennis Block and represented the defendants. The Goodrich case, your Honor, as you quite correctly point out, number one, is distinguishable on the basis that there was a violation of proxy rules 14(a) by all of the directors. As Judge Kearse in the second decision in Galiff v. Alexander pointed out under very proper circumstances not cited by Judge Walker that in and of itself would have been sufficient to excuse demand. More

importantly, I think where Judge Walker went off in Goodrich is where he found the directors had a pension. And the pension was determined based on years of services and that these directors needed to remain in office in order to maximize their pension. That interest is the financial interests that the courts look to in determining whether or not directors are biased are so conflicted so as to take away the business judgment rule of defense from their determination.

It was the financial interest, and whether Judge Walker was clear in the way he described it or not, he certainly set forth those facts about that board of directors. Every single director serving on that board had a unique pension plan and it was in his personal financial interest to remain on the board. So keeping Mr. Icahn out of taking control of Goodrich in that case was a very significant factor.

Additionally, the 14(a) violation in and of itself should have excused demand. In this case eight of the 12 directors have no financial interest pled by the plaintiff. Four more officers — eight are outside directors and I think that distinguishes the case, your Honor.

THE COURT: What is your response to the standing question: In view of the fact that Viacom did not raise this particular defense, do you have standing to raise it on your own?

I must tell you I don't think you do.

MR. BLOCK: Your Honor, let me first reverse the issue.

THE COURT: No, just answer the question.

MR. BLOCK: I will answer it. Yes, I do have standing. As your Honor points out, not even looking toward the Schlensky decision but looking at Markowitz here in your Honor's court is that the key had to be somebody with a fiduciary relationship as opposed to a stranger in the transaction. My client had and has 2.5 million warrants to purchase the common stock of Viacom which is the equivalent of owning Viacom stock. We are the equivalent if not better than the plaintiff who has a less

share of Viacom and we stand in the same sphere in the hierarchy of the corporation. We are truly a fiduciary and I suggest a closer fiduciary than the investment advisor in the Markowitz case that you found did have standing.

I would question whether any of the decisions thus far in this issue has pinpointed the real problem. Standing is an issue that in the first instance the plaintiff must get by. He must have standing to be in court. In order to be here pleading a corporation's claim he has to have standing and he gets standing by either having the court accede to his request to be here or by demonstrating futility. It is his burden which he must overcome.

THE COURT: He has chosen the futility route.

MR. BLOCK: And has failed miserably in pleading it.

THE COURT: Perhaps under Chitty's Rules he might not make it but we don't use them any more. At least I don't.

He did hand deliver a letter, and as I indicated has pleaded that. It seems to me that that is something we ought to look at.

What is the effect of that letter?

MR. BLOCK: I cite your Honor to a case I handled in Delaware which is right on point, Seibert v. Harper and Row.

THE COURT: In Federal court?

MR. BLOCK: No in Chancery Court. I might point out that the Delaware Chancery rules parrot 2.1 in all respects.

THE COURT: But the chancellors do not necessarily reflect in all respects the views that we reflect or are required to enforce the Federal securities laws. You know the differences that have come through the years. And Delaware, being that quaint state that it is, has always taken a rather strict position which I always considered was somewhat favoring the corporation.

Here we attempt, I think, to go down the middle. He did write a letter. It does seem to me under the circumstances he acted sufficiently. Frankly, I don't see that Mr. Icahn, who sold out at a premium, who owns no stock at the present time and who is alleged to have been a wrongdoer should be able, when the corporation has chosen not to do it, to impose the demand requirement to avoid a suit claiming misdeeds on his part.

It does seem to me that you are on the short end of this one based on the facts — and I could get into some comments where you attempted to distinguish Judge Walker's case. There was no finding in the Feinberg case that a particular number of directors had or didn't have already vested pensions. And frankly, I never ran into a major corporation yet where the directors did not receive some type of remuneration — perhaps not as substantial as Goodrich — but they are usually compensated handsomely for attending at directors meetings.

It strikes me that all of this is quibbling and I think should not detain us long since we have many more important things to do.

I think you have done your best, as you always do, to answer the impossible questions that I put to you. Why don't you sit down a moment and let me hit the plaintiff's counsel.

Why didn't you make the demand?

MR. BLOCK: If I might before I sit down.

THE COURT: Of course.

MR. BLOCK: I would like to bring two cases to your Honor's attention. One is Allison v. G.M. and another case I had a pleasure of being involved in the Third Circuit which stands for the same proposition that the Seibert case stands for which is that a pre-suit letter is not demand. I would like to point out to the court that the demand here wasn't a demand on the corporations to sue my client. It was a demand on the corporation

not to do the transaction and to sue themselves, in essence, to sue the directors for breaching the fiduciary duty. Never mentioned Mr. Icahn as a potential defendant or a wrongdoer. Secondly, I would like to mention the E.F. Hutton case in this circuit affirmed by the Second Circuit which says in language clear as can be that the kind of interest necessary to excuse the man is financial interest.

I go to Judge Walker's opinion again and point out that the uniqueness of the pension plan set forth in that case is a very distinguishing factor.

I take it back, Hutton has not been affirmed. I think it is Judge Owen and right on point with this issue.

Finally, with respect to the question of demand, demand has been made, apparently, by some of these very same plaintiffs in connection with a companion parallel state court proceeding which strangely enough isn't here but is across the street and the company rejected it. The company seemed to have no problem there in rejecting the demand.

THE COURT: It interested me that the company which might have been expected to raise this, didn't and this stranger to the proceedings did. We are not saying here, and I want you to understand this, Mr. Block, that the letter was demand. But that it bears on the futility of doing anything, and indeed, in my judgment, if anyone could be reasonable, this was futile. The directors were not about to do anything. They had decided to pay off.

In any event, why, and I asked this once before in another case where I went through this whole exercise – to plaintiff's counsel, why didn't they make a demand?

MR. LOWEY: Good afternoon, your Honor. Stephen Lowey. I hesitate to add very much to your Honor's exposition already because I learned long ago not to try to improve upon a situation where –

THE COURT: Where you are ahead.

MR. LOWEY: – and the judge has grasped the arguments in our briefs as completely or even better than we made them ourselves. But I will of course try to answer a question which I don't regard at unanswerable and that is: Why didn't we make the demand. Your Honor has already alluded to main point. The first being that under the circumstances where we had tried to avoid the situation, this was not hindsight on our part but rather foresight. It was clear having sent the letter that any further communication would be futile.

Your Honor has already mentioned that. Clearly another letter would have been a futility.

A second reason, and that is spelled out in the complaint, is that the nature of the claim is that there was coercion exerted, there was extortion exerted. The nature of the greenmail act here, and I am sure I will have an occasion to develop that more fully in the Hobbs Act argument. But the nature of the greenmail act is an act which is done, or the payment is done against the will of the payee. It is an extortion type of claim, and we will get to the point of where the Hobbs Act applies. But the point is it was not voluntary. We alleged –

THE COURT: It was voluntary –

MR. LOWEY: It was voluntary but it was coerced. It was voluntary. My point is this. That we allege that the payment evidenced a fear by the directors that unless the payment were made there would be economic loss suffered by Viacom and the Viacom officers, the loss of perks and all of that. That that was very real and the reason for the payment. Under those circumstances there's a definite futility in making a subsequent demand.

We tried to avoid it in the first place. The reason they did it is they knew perfectly well that they were violating duties, they were paying corporate waste. They did it anyhow and they

did it anyhow because of the coercive nature of the extortion claim.

That is a circumstance that makes it doubly futile.

THE COURT: In my view at least it would have been very good use of a 22 cent stamp and might have spared a number of trees.

Do you know, if I may ask this fact question, what the board members receive as compensation? They get per meeting, per year, some pension benefits after they've served as directors? It should be somewhere in a 10-K I would imagine.

MR. LOWEY: We have in the complaint only the compensation of the inside board members, in paragraph 7. We do not have the compensation of the outside board members.

THE COURT: That's what I would be interested in.

MR. LOWEY: We can supply that. It is not in the complaint but certainly it is publicly available, yes.

THE COURT: Let me ask you this question: If you were given this choice, which option would you accept: To wait, in view of Judge Walker's certification, and see what the Second Circuit does with this particular matter? Or to proceed with the lawsuit and take your chances that by following Judge Walker you might very well wind up in a situation where we would have wasted some time and effort?

MR. LOWEY: I would certainly rather proceed. First of all, I have every confidence by my reading of not only that case but other cases that bear upon the issue that there is every reason why Judge Walker should be affirmed, if the Second Circuit takes it — and that has not yet been decided yet. We can advise the court of that when it happens. We are monitoring it but it hasn't happened yet. So to answer your Honor's question today, we certainly have many reasons to wish to proceed and not to await

a determination by the Second Circuit, if indeed the Second Circuit will take it.

THE COURT: Very well. I don't think there's anyone else to speak on this particular issue and I am prepared to make a ruling on this question right now.

The court holds that in the context of this case a demand would be futile.

I take into account the plaintiff's prior letter, although I do not perceive it to be a proper demand. I do consider it in making my determination that a proper demand would have been futile.

As a second ground for my determination I hold that the defendants lack standing to assert this defense inasmuch as the defendants are no longer stockholders, nor do they in any way presently represent the corporation. And I would add that in their wisdom, counsel for the corporation have determined not to assert this defense.

We will move on now to the question of shareholders demand. There we would look to Wright and Miller. We have here another case where far too many trees died in vain. The requirement in Rule 23.1 that the plaintiff make demand on the shareholders "if necessary" incorporates substantive state law. If state law would require such a demand, so too would the Federal courts.

The plaintiff relies upon Federal law, or when the claim otherwise involves Federal questions, however, the courts waive this requirement and I cite 7 C Wright and Miller paragraph 1832 at pages 122-23.

RICO, which we will be dealing with shortly, is a Federal statute. In this court's view the shareholder demand is not required, and, in fact, even on the New York State extortion count the predicate acts in state law only lay the foundation for substantive Federal liability. So if RICO survives this

motion, it being a Federal statute, I think the demand is not required.

I'd ask Mr. Block, who rarely concedes anything, whether in light of what I have just said the defendants are not prepared to concede that a shareholder demand was not necessary.

MR. BLOCK: Not only are we not ready to concede, we point to you Allison v. G.M. as being right on point where the Third Circuit stated that you look to state law not to Federal law. And that was a RICO claim.

THE COURT: Can't you come up with anything other than the Third Circuit? I told you before that I am particularly concerned with this circuit and the Supreme Court. There are numerous cases excusing shareholder demands. For example, when shareholders are numerous. In this case you have a publicly traded company which is listed on the New York Stock Exchange. I have no present recollection of the number of shareholders, but those factors alone that I have just mentioned would indicate that shareholders are numerous. Anybody have any fact on that? I don't want to guess.

MR. LOWEY: We do have it in the complaint I believe. In paragraph 5 C of the complaint it is alleged that as of March 3, 1986, Viacom had issued and outstanding 20,636,777 shares of common stock held by more than 18,000 shareholders of record.

THE COURT: My law clerk has just given me the same information which is then supplemented by what I said about listed and traded. That's a lot of shareholders. It seems to me if we were talking numerosity, you have got a number of shareholders.

Does the defendant, Mr. Block, contend that Ohio law is binding?

MR. BLOCK: Yes, your Honor.

THE COURT: I thought you would.

MR. BLOCK: Your Honor, I might cite to you two cases by brother judges in this district, Duffy and Owen, to the effect that the number of shareholders is not the test and that both of those judges did enforce in the context of public companies the requirement that demand be made on shareholders and that the cases aren't cited in our brief but you should have them. One is Judge Owen's decision in Magid v. Mortgage Growth Investors, paragraph 95, 673 of C C H, 1976 Southern District case. And the second one is Clairdale Enterprises v. C.I. Realty Investors at 423 Fed. Supp. 257, Judge Duffy.

THE COURT: I respect both of my colleagues. In my view at least the requisite demand on shareholders should be excused where the shareholders are as numerous as they are here. Needless to say, if the RICO claim survives scrutiny I think Ohio law becomes irrelevant. But if you don't want to concede that, we can leave it for another time.

MR. BLOCK: Your Honor, so I don't misunderstand, it is only relevant with respect to the issue of standing to enter the court and that's with respect to the demand on shareholder issue and the demand on the board issue, not on the substance of the claim.

THE COURT: Let me say this. It is the height of something, — some people might say chutzpah, but I won't — it's the height of something for a stranger, not such as Mr. Icahn, to wrap himself in the mantle with which he has cloaked himself and make these arguments concerning demands, particularly shareholder demand. May I inquire if in Judge Owen's case and Judge Duffy's case the person was a stranger as is Mr. Icahn?

MR. BLOCK: My client in the Magid case was the advisor to the fund so I guess his honor found that wasn't a stranger. But I might point out Mr. Icahn is the second largest shareholder in Viacom. He has warrants to purchase over 2 million shares, to exercise right now. By tendering a check we are the second largest shareholder in the corporation. To characterize us as a

stranger when the Plaintiffs in the aggregate don't have a majority of the stock I believe is unfair.

THE COURT: I don't regard his warrants as I do the hopefully dividend producing certificates that are held by the shareholders. I assume as the holder of a warrant, which is usually a right to purchase, he doesn't obtain dividends or anything like that from the company in connection with his warrants, does he? He just has a right to purchase. He could, in my judgment, go out and by calls and be in the same posture. But that's your view.

MR. BLOCK: I would like to cite a slew of cases that agree with my view.

THE COURT: I am sure you would but it would deter us far too long. We have been deterred already, Mr. Block. I've made my ruling. Let us move on to the question of RICO standing. That's the most interesting question that we have here.

I don't know whether you are raising that question, Mr. Block, of RICO standing.

MR. BLOCK: Your Honor, the issue we are arguing is that there are no predicate acts.

THE COURT: Not standing?

MR. BLOCK: Not standing.

THE COURT: All right, thank you. That's the first time we have been able to move forward without some discussion.

Although I pondered this since my participation in a recent program which was participated in by one of your colleagues who is not here today, has given me much to chew about on the subject, but I think we can pass on that and move immediately to the matter that you just raised, the matter of the predicate acts.

There I think I will put the heat a little bit on the plaintiff's counsel. Let's turn first to 10b and Rule 10b-5.

Counsel, which material misstatements do you intend to rely upon?

MR. LOWEY: Your Honor, we allege two predicate acts of securities law violations, each in connection with a transaction which was also a greenmail transaction. Both involving the false statements in 13(d) filings made by Mr. Icahn in connection with those transactions. The first of which was the Saxxon Industries, the second of which was Hammermill Paper Company.

We do allege that those filings were false, they were violations of 13(d) and they were knowingly false. The facts related to those filings are set forth in the complaint. That is to say, the nature of the entire transaction and the fact that these filings were made. I might say that we are not the first to have raised the question of the falsity of those filings. In each case there has been prior allegations of falsity, none of which have been resolved in a dispositive way.

In the Saxxon Industries case the allegation was made that a false 13(d) was filed and that gave rise to a 10b-5 violation. Judge Pierce, sitting as a district judge, denied defendant's motion to dismiss that. So that case was Schnell v. Schnall. I can hardly pronounce it, but in any event, the import of Judge Pierce's decision is that the issue as to whether or not 10b-5 was violated is an issue of fact. That case went to trial, I understand, and was settled during trial. So the jury never got to decide whether or not Mr. Icahn committed violations of Rule 10b-5 in connection with the Saxxon matter because a settlement was entered into in the course of the trial.

THE COURT: Judge Brieant, of course, knocked down similar arguments in the Chock Full 'o Nuts case arguing that any shareholder would know that a buyback is possible. What do you have to say about that?

MR. LOWEY: I will answer that, but what I have to say about that, that goes I think more to the question of extortion and less to the question of securities violation predicate acts, but I will answer that.

First of all, that was not a Hobbs Act case. Judge Brieant was not being directed to and asked to read and apply the Hobbs act as we are asking your Honor to do. It came up in an entirely different context.

Secondly, this was a fight between a raider, if you will, and a management, a litigation in which clearly the vigor of the defense negated any greenmail payment. There was no extortion involved or possible extortion claim because nothing was paid. There was no payoff and no payoff intended or contemplated.

The litigation proceeded really with the defendants raising the argument that this is what he intends, he intends extortion.

THE COURT: What difference does that make? The ruling there was on 13(d), was it not, not Hobbs Act?

MR. LOWEY: It was on 13(d). But the point of it is that the extortion — what your Honor directed my attention to and what is the point of the case that's made by the defendants is that Judge Brieant's order said there is really nothing much wrong with what is happening here based upon what was argued to him and the situation as he saw it. He said there's a cow that somebody wants to milk and the other guy wants to milk it and that's sort of natural. That's the way of corporate life. We all know that.

THE COURT: That's the way it is up in the northern part of our district, you see, we work with analogies such as cows.

MR. LOWEY: If that's the analogy I haven't seen any cows near my home. I think clearly Judge Brieant was clearly speaking dictum as far as that argument goes. It was a very colorful

way of expressing it. But really, judge, you compare that to Judge Walker and see the contrast. Judge Walker, who had a greenmail case in front of him, a real live greenmail case, not a hypothetical greenmail, because that's what was being argued in Chock Full 'o Nuts, they claimed there was an intention to extort or reference was made to the extortionary nature of it, but that was all pure hypothetical.

Judge Walker, on the other hand, had a pleading in which there was a consummated greenmail, and addressing that pleading he saw something very much wrong with the situation. He said the directors had no basis for exercising business judgment under those circumstances. Clearly wrong. You compare Judge Brieant to Judge Walker and they are totally opposite.

Judge Brieant I forgive because he was not faced with facts that would lead him to the conclusion that Judge Walker came to, and it was really pure dictum and was throwaway, as far as I see it, really did not meat any of the issues that we are faced with today.

THE COURT: I would ask you whether or not you believe that Judge Walker properly disposed of these contentions?

MR. LOWEY: Are you speaking of the fiduciary duty contentions?

THE COURT: Essentially.

MR. LOWEY: Yes, I do. I believe he is absolutely correct on that.

THE COURT: Would you want to argue that Icahn's plans as they developed constitute manipulative devices? Was he manipulating the stock in that sense?

MR. LOWEY: We have not alleged that and we have no basis for alleging it at the moment and we would not intend to pursue that approach.

THE COURT: Of course, he did not cause the entire value of price of the shares across the board to change, really, he just got his own payment and didn't seem, from my perspective, to be manipulative either. So I can't fault you for your position there.

Just continuing along the same lines, are your predicate acts Hobbs or on the securities laws, which you just have argued? Or do you say that you have one from column A and one from column B?

MR. LOWEY: We have six from column A, which is consummated extortion; we have two column B which is securities law violations, and we have an additional nine, I believe, from column C which are conspiracies to commit extortion. So those are the predicate acts as they are delineated in the complaint.

THE COURT: You would make a good United States Attorney, you could come in with a multi-count indictment.

I would ask you, however, you were commenting about Judge Walker a few moments ago, if under 10b-5 didn't Judge Walker throw out those contentions. I thought he had.

MR. LOWEY: Judge Walker I think it was 14(a). yes he, he he did dismiss a 14(a) violation.

THE COURT: Let's move on to Hobbs because I think as you said at the outset that's really the center of it.

Let me again, if I could without dwelling too long on it, set the stage and then my first inquiry will be to the defendant's counsel.

I think we focus here, since we don't have a real contest on RICO standing, on what I would characterize as the predicate acts. What I am looking at, frankly, is at this point Judge Walker's opinion which I found to be exceedingly helpful, in

general. He discussed the 10b claims and then he moved on to the others.

I am going to pass to the others because I think it's just as well under the circumstances, the hour is late. You start out with the statute itself, the language of which essentially is well known to both of you and which obviously he focuses on extortion which is defined as the obtaining of property from another with his consent induced by the wrongful use of fear. That fear could be physical, could be economic.

As I understand the plaintiff's theory of the case, it is that when Mr. Icahn purchased Viacom stock he put the Viacom board in fear of their jobs, he put them in fear of business disruption, and the fear came from the fact that the directors knew of his reputation from prior similar acts.

The arguments raised by the defense here I think could be really dealt with summarily. There is a contention first that Icahn's acts, which is characterized as the purchase of stock in waging a contest for corporate control, are not unlawful, and, as well, that threats to engage in unlawful conduct cannot constitute the basis for an extortion claim. And they urge dismissal. I have a lot of difficulty with that argument.

Blackmail is often a threat to do legal or permitted acts. And I must say I have those cases here when I try a Hobbs Act case.

The plaintiffs have cited a number of cases involving labor picketing, which is lawful in itself, but obviously becomes illegal when labor leaders take side payments, and a lot of cases to that effect. Certainly a corporation has no absolute right to be free of contests for corporate control just as an employer has no guarantee of labor peace. It is nevertheless extortion for an investor to threaten to fight or strike to coerce a transfer of corporate assets that is a payment for his own personal benefit.

I must say that in the context of the activities here, although perhaps there has not been too much judicial acceptance of this

up to now, the analogy in my view is, if not persuasive, appealing.

The defendants argue that the Hobbs Act does not apply. I must say over Judge Pratt's dissent, the Court of Appeals for this circuit applied the Hobbs Act in a way that I think applicable here.

So I turn to Capo — not the mob figure but the name of the defendant — a case that has been cited a number of times. It is relatively recent case having come down just last year. The victim's fear may clearly be fear of a loss that is purely economic. Judge Walker has accepted this in his case and it seems to be a common-sense argument that both officers and directors, particularly the insiders, fear the loss of their positions. For the insiders it's often their livelihood. And notice that the economic fear here certainly need not be of self-interest but might be information that the corporate economy, that is the corporation's own economic well-being, might be disrupted. Clearly the loss can be future oriented and the defendant need not have instilled the fear. His reputation would often be enough.

There were two fellows in this state about 50 years ago whose names were Lepky and Gura. They just had to show up. In fact, as I recall it, people would show up on their behalf and say that they were there on their behalf and extortion payments would be promptly forthcoming, because the persons who were paying the money were aware of the reputation of the individuals.

So you have the Capo court recognizing, as I say, these essential factors, and recognizing that the bottom line was the exploitation of a fear of economic loss in order to obtain property to which the exploiter is not properly entitled.

We have a factual question here and that would be the fear of the board. So it may well be that some day down the road that is going to be something to be presented to a court and/or a jury.

The real issue that we have seen at least is whether Mr. Icahn is entitled to the premium he has obtained. That is, is it a legitimate gain which comes about by hard bargaining, or if the payment is improper. That characterization seems to implicate other bodies of substantive law. And it seems to me we could look at it from the point of view of the directors.

What I am getting at, obviously, is there are factual questions here which probably preclude the dismissal which is sought. Perhaps once they are fleshed out with discovery, there may be a disposition short of a trial. I don't see the disposition coming about at this juncture.

You get to this question: Can the directors legitimately pay premium? Certainly what they pay, how they pay it is essentially a matter of some common knowledge. Then we get into all sorts of problems: Corporate articles, state corporation law and the good old business judgment rule. And we have to look at it from the adequacy of the consideration. As I understand it, the claim is that Icahn gave his promise to go away for a number of years in exchange for a payment received for his stock which was in excess of the value of the stock on that day on the market.

I note the defendant's hypotheticals and would comment that none of them are persuasive. Their first example omits entirely the element that the corporation pays somebody property to which they are not entitled, that is, a premium. When you add it, it becomes our case. The second example, likewise, omits any side payment of a premium outside of the collective bargaining agreement. The Hobbs Act could and perhaps should apply to strike suits except for a settled line of cases allowing resort to the courts.

It seems to me that under the circumstances we have got all sorts of ramifications which I won't burden you with, including anti-trust violation. There just doesn't seem any defensible distinction or reason to accept the invitation extended by the defendants.

I think the only one of the examples which I thought was an interesting one was the sports example. Is assuming the player is under contract, this might be actionable under Capo. It is, however, a whole lot easier to see such a threat as hard bargaining, since the player obviously desires a signed contract; whereas I am not too sure that most people who were in are in the position of Mr. Icahn earnestly wish to assume control of a corporation. Needless to say, he did assume control of TWA. Whether that means that's enough for any one man or not I am not prepared to say.

That distinction is a plausible one and may be sufficient to hang an argument on. It seems to me what we are going to be talking about is the exploitation of fear, the cause of which need not be unlawful, and the intent of the exploiter. Clearly the use of fear must be wrongful to survive the test.

The plaintiffs recognize that if Mr. Icahn's intent at the outset is crucial. If he didn't intend to complete a takeover but only to force the payment, then I imagine the act would be indictable.

It seems to me that puts the plaintiffs at the bottom of an uphill fight. But it seems to me at this stage proper pleading will survive this, as well as a Rule 56 motion just as long as the court can be satisfied that Icahn's intent remains an issue.

I think that what I have done is pretty much spell out my thinking. There are two other matters that should be dealt with briefly. I don't think either of them are binding. The reliance of the defendants on the Chock Full 'o Nuts case that was referred to a few minutes ago, and the Dan River case down in the Fourth Circuit.

I don't think, frankly, that that's going to turn too many people around. Turning to Mr. Block, make your argument as you perceive it and then I will ask you a couple of questions.

MR. BLOCK: After all that you are going to let me make my argument? Thank you, your Honor.

Your Honor, you are dealing with commerce, and if you are correct in what you say, you have put one major road block in legitimate commerce on the street, because in any negotiation concerning anything leverage and economic fear is the motivating factor that ultimately results in the determination by both sides as to where to agree, how cases are settled.

You look at what you are trying to accomplish and what you may lose. Fear, which you have identified as an issue here, can't just be fear. Even Judge Kearse in Capo says it must be reasonable fear.

THE COURT: I figured that my cushy position as an officer and director of a profitable corporation is going to be terminated and that I perhaps do not have the proverbial golden parachute and I have reached a point in my career that it is unlikely that I can do as well, wouldn't it be reasonable for me to have that economic fear?

MR. BLOCK: You are suggesting a director has breached his fiduciary duty in what you describe. Let me just cite to you what a director says. He says this case can't be looked at in a vacuum. Director Allan Johnson asked the exact question. There is a similar case in the state court.

THE COURT: When is that case going to be tried?

MR. BLOCK: "Q. Is it fair to describe the board as being scared that Mr. Icahn may get control of this company?

"A. I don't think being scared had anything to do with it." That's not part of this motion but let me put the case in context. Mr. Icahn brought bought 17 percent of Viacom and announced he wanted to pay a $10 premium over the market, $75 for a $65 stock. The company first adopted a poison pill which says you can't buy the company. Then they add adopted a poison put which means if you buy the company all the debt holders get all the stock back. They answered that they were going to do a discriminatory tender offer. They were going to make a

tender offer to all the shareholders of the company. But Mr. Icahn I guess I ought to be suing for extortion, civil extortion which doesn't exist against the board of directors of the company who literally forced my client to sell his stock.

The Fourth Circuit in describing this kind of circumstances in the case you have looked at, the Dan River case, said, in essence, this is just a question of whenever somebody seeks to purchase a company, a board, in its fiduciary responsibility and relationship, has to make certain determinations. It may be defensive actions. One of the defensive actions it may take is it might enter into negotiation and find the strike price at which a willing seller is willing to sell and the company is willing to buy.

This case shouldn't be looked at in a vacuum. The price of this stock according to today's newspaper on a post-split slit basis is $100 a share. Maybe recision is an appropriate ready. We could give back to the corporation a $75 stock that we sold a few months ago and get back $100. The very board of directors wants to do a management L B O, but they only want to do it at $98 because an outside group wants to pay a hundred. To look at the case of Viacom and say that because the plaintiff says we received more than the market price is to be myopic.

Stocks have values. The market place need not always find the right value. Here we have evidence, that the court can take judicial notice of, that the company is worth, let alone in the eyes of the greedy management $100 dollars a share, 33 1/3 percent more than my client more than a few months ago received for his shares. I think that demonstrates the question of bargaining gaining. There was a buyer that thought the stock was worth bump and a seller that thought it was worth bump. That we receive something more than the market I don't think is any particular issue. That when Joe Morris tells Mr. Parcells that he is not going to play in the superbowl unless he received a 100,000 is not extortion.

THE COURT: Joe Morris is an unique individual?

MR. BLOCK: 17 percent of a company is a unique amount of shares.

THE COURT: Is it really? Other than it is a lot of shares, it's not unique. Each share as a par value. Each share entitles the shareholder to a certain per share dividend. The market values, the shares, it seems to me that market value is used for many purposes, among other things, the tax purpose. But here Icahn got $55 million more than the market. Why? That's the question. Why?

MR. BLOCK: Because his choice, as put to him by board of directors of this company, was if you don't sell us your shares we will do all the things I just said including a discriminatory tender offer. These are all publicly filed documents that this court can take judicial notices. He had a choice. Either he was going to be hit very very hard or accept what was being offered to him for his shares. The board of directors as it turns out was correct in valuing the company because a couple of months later they told their own shareholders that they were willing to pay them $98 a share, and indeed National Amusements announced today in the newspapers they were willing to pay 100.

They made a business judgment. The judgment was that Icahn in offering $75 dollars a share was making a bid that they viewed as inadequate. In their business judgment they thought the company was worth more. In this case they proved to be correct by subsequent events. Somebody was willing to pay a hundred dollars a share.

THE COURT: You know what you have just done, and it's understandable, you have just sealed my mind that though you may prevail on the merits, it would not be appropriate to decide the issue that you have presented on a Rule 10b-6 motion. That's where we are. Remember, we are not at a point where we have just finished trying the case and your argument is that the plaintiff has not made out a case by a preponderance of the evidence.

The real question in my mind is do we have something to try, and the answer in my judgment, based on what you just said in response to my question, is yes, we do. You may be right, but it seems to me that whether or not you are right has to go beyond the face of any set of pleadings.

MR. BLOCK: Your Honor, if I can respectfully disagree.

THE COURT: You certainly can.

MR. BLOCK: This is not an issue of fact. This an issue of law. The lawful activity, the lawful act to do something lawful can't be a violation a criminal statute, which is what your Honor is saying you are ready to say can go beyond the motion to dismiss. You cannot have legitimate commerce be extortion, and that's what you saying.

THE COURT: No, but you see what you have got. I get this a lot and you may recall I get this usually at the conclusion of the government's case in a criminal prosecution when the defense gets up and argues for a dismissal. At that juncture I have to invariably tell people — and you do it also in civil cases — that at least at this stage of the litigation those reasonable inferences which are to be drawn have to be drawn in favor of the plaintiff. You may come in with tremendous arguments that will persuade a jury: Mr. Icahn is a benefactor, or that his judgment was terrible, he only took a $55 million profit when he could have taken a hundred and maybe we should take up a collection for him. But isn't that to be left for another day? That's the real problem.

MR. BLOCK: Your Honor, you are expending the law and in doing so you are opening the courts to anybody who has ever engaged in two or more negotiations to be sued by an unhappy adversary at the bargaining table for extortion or coercion in the negotiating process.

Moreover, if in fact we are going to say on a motion to dismiss in the RICO context that based on this thin reed we are going

to say discovery, in what they characterized as six from column A and two from column B is appropriate, we are going to place upon the defendants an enormous burden of cost and effort to defend a case which, your Honor, I believe as a matter of law should not survive this motion.

THE COURT: Let me put a question to Mr. Lowey. Based on what Mr. Block has been saying concerning the present value of the shares, would you kindly tell me what your client's damages are?

MR. LOWEY: Your Honor, the damages are calculated as of the time of the greenmail. That's point one.

THE COURT: Am not sure I agree with that, but let's hear your arguments.

MR. LOWEY: The damages at that time, let's focus on that time –

THE COURT: Did your client sell his stock?

MR. LOWEY: I'm sorry. I have misspoken and we are not on the same wavelength.

THE COURT: I thought at the time of greenmail he sold his stock.

MR. LOWEY: I answered the question as if my client was part of the corporation. I want to make that clear. Our client here is Viacom. This is a derivative action. Mr. Anderson is suing on behalf of the corporation and so in answering your question, my answer is –

THE COURT: Wait a minute. You have those security law predicates that you were talking about before. You've got to be

a buyer or a seller, don't you? The corporation can't own those claims, am I not correct?

MR. LOWEY: A different issue but I will answer it surely, your Honor. We are claiming – I want to fit the predicate, your Honor's question, into the whole scheme of things.

The predicate acts that we have alleged are specific prior violations of the securities laws knowingly by Mr. Icahn which are, by definition, predicate acts under 1961, that is, the RICO statute. We start off with 1961. The RICO statute takes you in different phases at the time. Your Honor's question: What about damages? and that comes under 1964.

So first we start off with 1961, what are the elements of a RICO claim. And we take them element by element. One the elements is you have to allege a –

THE COURT: There are seven constituent elements.

MR. LOWEY: Pattern of racketeering activity.

THE COURT: That the defendant through the commission of two or more acts constituting a pattern of racketeering activity directly or indirectly invests in or maintains an interest in or participates in an enterprise, the activities of which affect interstate commerce. That's not me, that's Moss v. Morgan Stanley. The plaintiff also have to show that they were injured by reason of the defendant's prohibited conduct, also coming out of Moss v. Morgan Stanley, and specifically referring to 1964 C.

Now we start with that. Do you agree with my explication so far

MR. LOWEY: Not quite. The reason I don't agree is because the injury that is being claimed is not an injury that comes by

the injured party from the predicate acts. That is not a sequence of the statute, and it is quite clear that's not the sequence of the statute. It's not the predicate acts that cause the injury. It's the predicate acts that give rise to the substantive violation.

One turns to Section 1964 which is entitled Civil Remedy to Determine Who Can Claim Injury. The words of the statute of 64 C, "Any person injured in his business or property by reason of a violation of Section 1962" so one has to turn to Section 1962. 1962 has four component parts. Only three of them are involved in this pleading.

The first violation of 1962 subsection A which is alleged in this pleading is the use of the proceeds — I will be colloquial rather than statutory, but the use of the proceeds of the prior greenmail in the current greenmail. It's the proceeds of the pattern of racketeering activity that are being used here.

The subsection B of 1962 deals with the acquisition of an interest in Viacom as part of a pattern of racketeering activity. We claim, we allege that his acquisition of shares of Viacom was part of a pattern of racketeering activity just as it was with the other prior extortion racketeering pattern that we have alleged in these other situations.

And subsection D is conspiracy. In order to be entitled to the civil remedy provided by Section 1964 C, we have to show that we have been injured, we meaning Viacom the corporation, in this derivative action that Viacom was injured in its business or property by reason of Icahn's violation of Section 1962.

If we establish that, that because he had been engaging in a pattern of racketeering activity and throughout that he made an investment in Viacom and he then goes ahead with the substantive violation in the Viacom situation, not part of the prior pattern but here alleging a specific action of extortion against Viacom, and they are damaged as a result of that, we have satisfied the pleading requirements of the RICO statute.

Your Honor is quite right to say that proof is another matter; but we do not have to show, and specifically – my colleague is pointing out to me quite correctly in response to answer your Honor's question about where's damage, we do point out that the F.A.S.B. accounting rules required Viacom, and Viacom did take a $28 million charge against it's current earnings for the quarter ending June 30, 1986. That was required to be done.

THE COURT: I don't think that answers my question.

MR. LOWEY: That goes to the point of what are the damages.

THE COURT: No, it doesn't. That's an accounting matter. He may have gotten money from a company which had a substantial intrinsic value which was cash poor and could have and would have preferred to use its cash for other purposes and was required to take this charge. But let me assume another set of the facts.

It would be legitimate, as I see it, to pay Icahn what they paid him if the directors were to say, we paid him more than market but we knew that the corporation was worth more than he was offering.

In that circumstance it seems to me the directors are respecting rather than abrogating their duty to the shareholder when they tell this fellow to go away and they pay him off to do so, because in the context of that, they have preserved the shareholder to another day when the stock goes up.

I had a case years ago where I recall that just because the stock went up in value during the pendency of the litigation, my claim went down the tubes.

I am troubled by this question of damage. Yes, they paid more than market, and I think if your man had sold out and then the price of the shares had gone one way or the other, he might have had an argument. But he held on.

He is there really suing derivatively on behalf of the corporation. But what is the corporation? The corporation is the sum of the shareholders. And it seems it me if the sum of the shareholders have actually benefited by the stock going up beyond what Icahn got, beyond what Icahn offered, there may be a serious question of liability but no damages.

MR. LOWEY: May I respond to that. I think I can supply the necessary ingredient between the premises of your argument and the conclusion for your argument. That ingredient is something that your Honor deals with in every tort case that your Honor handles. That is the ingredient of proximate cause.

You are missing something here. Let me give you the opposite hypothetical. at the end of May, management of Viacom, directors of Viacom pay a premium over market, substantial premium over market, to Icahn and at that particular point in time there's no question that the market could ever give him that and he has come out with a premium. Within the next few days something terrible happens at Viacom. The FCC establishes a new rule that you can only have one television station or cable station, or worse yet, Bill Cosby gets arrested for a morals violation or something like that and the entire value, the Bill Cosby series has to be taken off the air. The point is: intervening events.

I am suggesting to your Honor that what happened subsequently, like the investment of Mr. Redstone who is the person who is now making this bid that we are reading about in the paper, is an intervening event. It is something that happened subsequent to the events we are dealing with here and it is not an event that is related to, for purposes of calculating damages, Mr. Icahn's situation.

THE COURT: I am not persuaded, let's put it that way. Let me get back and maybe I will help you if I get back on to Mr. Block. Mr. Block, can you favor me with any square holdings that what has been characterized here as greenmail is per se lawful?

MR. BLOCK: Yes. I think, your Honor, that the Fourth Circuit and I'll read to you a paragraph from the decision in Dan River: "Plaintiff likens ultimatum to an extortionate threat but we fail to appreciate the supposed similarity. Icahn does put a corporation's management to a difficult choice: Accede to a takeover or employ defensive moves but so does any party who altogether lawfully contempt plates a takeover attempt."

That case is on all fours with this case on the question of greenmail.

If I could go back to Capo, it is a case that Judge Kearse wrote the opinion on.

THE COURT: Let's stay with Dan River for just a moment.

The case as I read it really only holds that the plaintiff's complaint did not justify injunctive relief under the securities laws and what you have read really does not solve the problem. The RICO claim foundered on the predicate offenses of an investment company Icahn controlled and previous greenmail offenses. The court concluded, and I would quote, "There are just too many flaws and too much speculation" and that's at Page 290 of Dan River. So I do not feel that Dan River, much as you would like it to, stands for the proposition that greenmail is per se lawful. Now you're back to Capo. I just thought should leave you with that with that comforting thought.

MR. BLOCK: I would like to disagree. The court in Dan River did deny a preliminary injunction but it denied it because there was no likelihood of success on the merits. The language I read to your Honor at least with respect to the allegation of greenmail –

THE COURT: It would have been helpful if they sua sponte dismissed. What happened after the denial of injunction, if you know?

MR. BLOCK: In all of those cases that's the end of it. The company's employees did an employee ESOP and that was the end of it. There are a slew of cases in New York, Delaware and elsewhere that hold in essence that the purchasing of stock by a corporation, a target of a repurchase, not the word greenmail, is perfectly lawful and totally within the discretion of the board of directors of the public company. I cite Lewis v. Daum in Delaware and there is a slew of cases in New York. I would be happy to supply your Honor with the names.

My colleague says Pollack v. Delaware. There are a whole bunch of cases which hold that a corporation in dealing with its own stock including lat has been called greenmail is perfectly legal. The issue sometimes comes up –

THE COURT: I wouldn't argue that general proposition dealing in its own stock. There are numerous companies which presently are repurchasing stock. I may disagree with their economic theory, and it has been discussed in economic journals, but that's perfectly legal. I don't think that's getting me where I want to go.

MR. BLOCK: That's all you are dealing with in this particular case.

THE COURT: No, it isn't. Purchasing in the market is one thing; purchasing from an individual with the reputation of your client, for a premium, is something else.

MR. BLOCK: Let me deal with both of those issues. First, your Honor, when I said targeted repurchases that means exactly greenmail, purchasing from a specific individual at a price significantly above the market price. There are no less than ten cases that say that that's perfectly within the discretion of the board of directors of a public corporation and there are none, with the possible, possible exception of the Goodrich case, on the legal issue whether the demand was appropriate that might be said to go the other way. And I am not sure it goes the other way.

Secondly, it is unfair to talk about the reputation of my client. What has been alleged in the complaint here was that because it was Mr. Icahn there was fear. Fear of what? What has Mr. Icahn done? He has acquired two very large public corporations TWA and ACF. Both public, both in excess of a billion dollars in capitalization. Mr. Icahn has at least on six other occasions purchased stock. His reputation is he sold the stock back. There was a contest. Management that said we don't want to sell this company, we want to stay independent.

What's the fear created by Mr. Icahn's reputation? What is the connection? What is this reputation? Supposedly, according to this complaint because we are only dealing with the completed transaction in the complaint, that they say is Mr. Icahn's reputation? Takeovers are a perfectly legitimate activity. If in fact Mr. Icahn succeeded with the complaint and was successful and if in fact some of those people lost some of their jobs, which is possible, and in some cases it doesn't happen, is that illegitimate economic activity? Of course it is not. His reputation for what? To me the pleading on its face is insufficient when it says fears are created by Mr. Icahn's reputation. Reputation to be bought out? Why would that concern him. This would make them happy if he goes away.

Reputation to do what? What they are really saying is the reputation to acquire companies and get rid of certain management people. Your Honor, that's capitalism. That is what has happened in America in the last ten years. Companies have been acquired by different managers and certain economic changes in those companies have taken place.

THE COURT: The actual acquisition? The actual takeover creates no problems.

The fear of a takeover, the crying of wolf, if that's what it is, creates the problem. You gave me a whole hatful of cases a few moments ago and I was curious when you said there were so many out there, if those cases concern premiums for control.

MR. BLOCK: Yes, in every one of them that's the issue. I would be happy to submit that and I will do it tomorrow morning.

THE COURT: I have thought so. I would like to get those from you because certainly they are significant. I that's what you said but I wasn't sure. I want to go back. If you just would send your adversary a copy. I should like to see those and study them.

I think I interrupted you before when you were talking about Capo.

MR. BLOCK: I will be brief and I know it is late. The Capo case deals with an individual charge by a corporation, Kodak, with responsibility. His responsibility was to hire people. What Mr. Capo did, he was an entrepreneur. He decided he wouldn't hire anyone who didn't pay him some special amount of money. He took, in essence, a bribe. He received something he was not entitled to and he illegitimately — this is sort of like the insider trading cases, the misappropriation theory. He violated his responsibility of trust to the Kodak Corporation. Kodak didn't hire Capo and say go hire some people and, by the way, if you can make a couple of bucks on the side, please do that. They said your job in personnel was to hire. He did something improper. That is the distinguishing fact in Capo.

If you look at the Supreme Court's decision on U.S. v. Edmonds it is right on point. Some crazy union person, similar to what happened in the tragedy in Puerto Rico, took a gun and shot and blew up corporate property. He did it in order, like Joe Morris wanted a better deal, wanted more salary. The Supreme Court of the United States said that he may have violated a whole bunch of other laws but that was not extortion because it was perfectly lawful for him to want to desire to get the most money he could get for his services. Just as Mr. Icahn would have an absolute right to get the most money he could get for his share of securities.

Your Honor, I suggest to you that the firing of the gun, the exploding of a plant, the possible killing or maiming of individuals is a very, very serious unlawful act. The Supreme Court of the United States in I guess 1984 held that those facts do not constitute extortion. I prevail upon this court, you cannot say that negotiation between two parties where one may be perceived to have more leverage than the other will constitute extortion. You will open up the court to almost a floodgate of litigations dealing with people who negotiate amongst themselves.

I think the distinguishing fact in Capo and all the other cases that do find extortion is that something improper is being done. Money is being taken in bribery. It's the union leader who says, I have a right to picket, but if you pay me a couple of bucks under the table I will remove the picketing. Those are the extortion cases. Your Honor, this is a perfectly litigate economic activity. The sale of stock, whether it is purchased by the company or anybody else, is a choice, as the Fourth Circuit said, that the directors made in their business judgment. What is it worth to them.

THE COURT: Extortion usually, you are saying, is a side payment, usually cash under the table.

MR. BLOCK: Inconsistent with your obligation — it's like the misappropriation cases. If you look at Judge Pollack's recent decision. You have an assignment from your employer and you are doing X but you do X plus Y. You go beyond what your right and your role is and you take something special for yourself. You in essence have violated that trust to the employer on whose behalf you are operating. That's are what those cases say. That's the theory.

THE COURT: Let me ask this. I would like to come back for a moment to Judge Walker's decision. We deal with them here, the aiding and abetting cases. Is there a fair agrument to be made based on Judge Walker's decision that there could be a charge leveled against your client that he aided and abetted the directors in violating their fiduciary duty to the stockholders?

MR. BLOCK: First you would you have to have an allegation that the board of directors of this company breached its fiduciary duty and then I think it is perfectly consistent with Judge Walker's decision to say that my client, or to allege that my client aided and abetted that breach of fiduciary duty. Your Honor, 1961 doesn't list aiding and abetting, breaches of fiduciary duty as a predicate crime for RICO. It has to be an indictable offense. I suggest to your Honor that there has never been an indictment in this country for greenmail. Never, ever, ever, ever.

THE COURT: Let's ask Mr. Lowey the question as to whether he makes that argument in this case, that there was a breach of fiduciary duty by the directors of Viacom which Mr. Icahn aided and abetted.

MR. LOWEY: We do not make it in this case. That is precisely the claim that is being made in the Supreme Court action but not in this case.

THE COURT: That gets me to this. What are we doing? Are there two parallel cases? And, if so, why?

MR. LOWEY: Surely. The answer is there are two cases but they are not parallel. The Supreme Court action is an action that deals with the leveraged buyout transaction, which is another situation, in addition to the Icahn greenmail transaction. It encompasses both transactions. And in encompassing both transactions it does make allegations of breach of fiduciary duties in connection with both transactions and it does make allegations that Icahn aided and abetted in the earlier one. That is, in the greenmail one.

THE COURT: Why shouldn't this case, then, which covers less ground, be stayed pending the outcome of the state court action which covers more ground?

MR. LOWEY: They are totally independent claims. Let me try to put in focus the elements here. This action was started

in May of this year. The state court action was started in September. This action does not raise fiduciary duty claims at all. It is strictly a Federal action. We did not append state law claims here.

THE COURT: You have no pendent claims, I recognize that.

MR. LOWEY: By reason of subsequent events which occurred after the events with which this lawsuit deals, a state law action was commenced. The state law action raises violations of state law which are independent and not related to the RICO claims here. We don't claim to answer your Honor's question. We don't claim that those are predicate acts. Mr. Block has argued, and he is right, I completely agree with Mr. Block, there is no basis for alleging that a breach of fiduciary duty which is a violation of an equitable obligation gives rise to an indictable offense under 1961. He is right about that and we don't claim it. So breach of fiduciary duty is really not an element of the RICO claims here at all.

But what is happening in the Supreme Court is there have been claims made for state law violations. Different laws are involved. The RICO claims are not at all dispositive of the claims in the state court or vice versa. Either case could win or lose by either party totally independent. The one does not depend upon the outcome of the other, so they are really separate and independent claims.

If I may, your Honor, address a couple of points. Have I satisfied your Honor's question on that? I would be glad to pursue it further.

THE COURT: The hour is late and I don't think it would serve much purpose to speak further.

MR. LOWEY: The state court claim involves other issues, other factors. The Icahn greenmail is part of it, but only fiduciary claims are made there and they are independent. May I also add that I'm sure that Mr. Block will defend those

vigorously there as he is defending here. He may stand before your Honor and say, well, sure they can go across the street, why do we need to be here? When he gets across the treat he will be making quite a different argument. He will be not so ready to concede that his client would be willing to admit to breaching fiduciary duty.

I would like to come back to the Hobbs Act which is before your Honor today. Let me talk about what Mr. Block insists is the distinction between our claims and these other cases.

He is willing to admit that labor racketeers are guilty of extortion, that is, thugs and mobsters, but not model corporate citizens, people that have never been put in jail for committing crimes. Those people can't commit extortion. If you are a purchaser of large amounts of stock, if you are a corporate raider, that's not criminal.

Well, the statute doesn't make that distinction. Specifically, the Culvert case, United States Supreme Court in interpreting the Hobbs Act says you don't have to be a racketeer to be guilty of the Hobbs Act. The United States Supreme Court has made that specific distinction.

Mr. Block would like that distinction to be made, and if not made on the law at least the suggestion that this is really what we are talking about when we are talking about Hobbs Act, talking about thugs and hoods. Not so, Mr. Block. The Supreme Court says that.

The question is, what is the effect of people like Mr. Icahn in the financial community? What do his peers think of the activities?

THE COURT: That is irrelevant. This is not a popularity contest. Let me just put this to you. This so called greenmail has been well known now for four or five years. The U.S. Attorney in this district, and I am sure in many others, is aware of both RICO and the Hobbs Act.

Can you note any prosecutions of people who have acquired the reputation of Mr. Icahn, and, if I may say so, three or four other individuals who at least bear a similar reputation, including Mr. Pickens, I suppose and Mr. Goldsmith – he's not a mister, I guess he's a sir – and a few others?

MR. LOWEY: Your Honor, I was waiting for that question. Because my answer to the question is of course there has been no prosecution yet. The followup question is why not, and let me answer that.

Specifically in this circuit, Sedima has made clear two vital interpretations of RICO. Number one, you don't have to have a racketeering injury, and, number two, the predicate acts need not have resulted in criminal convictions.

Prior to Sedima the United States Attorney in this district, under this circuit's interpretation of RICO, could not have indicted and convicted Mr. Icahn, had he been so motivated, under existing law. Now, since Sedima, which is 1985, less than two years old, it is now clear from the Supreme Court that Mr. Icahn, who has not been convicted of a crime, but if he has committed an indictable offense he is subject to such indictment. It hasn't happened yet. It has not happened to any of the raiders yet. There has been no prosecution since 1985 of any greenmail.

As your Honor points out, greenmail is a relatively new phenomenon in terms of the magnitude of the problem in the financial community. Let me say it has not gone unnoticed by commentators in courts either. If I may –

THE COURT: No, don't, the hour is too late, you are off the track. I think I have your point. I think I have one or two more questions for Mr. Block and then maybe we will suspend.

Mr. Block, the aiding and abetting would go to characterizing the premium as one to which Icahn is entitled. If he is not so entitled, the payment results from extortion which would be the predicate offense and therefore indictable and a RICO claim, would it not?

MR. BLOCK: We have substantial disagreement on that. The violation would be a breach of fiduciary duty, a waste of the corporate assets by the corporate nondefendants, the board of directors, and if in fact they violated their fiduciary duty there is case law that says we could be charged, if the facts demonstrate it, with aiding and abetting and breach of fiduciary duty. That's the current state case as it that exists.

I have a complaint, I would like to hand it up, it is going to parallel at this time and we are being asked in essence to defend exactly the same case in two different courts in two different places. The answer is it is not extortion, but it is breach of fiduciary duty by the board of directors and waste of the corporation's assets and possible allegations of aiding and abetting.

THE COURT: Not a state crime either?

MR. BLOCK: No. I hear Sedima is two years old. What did Sedima say? It said RICO should be read broadly. It didn't say that the predicate crime such as the Hobbs Act or the New York Penal Code should be read broadly. Indeed we construe our criminal statutes rather narrowly. Sedima does nothing to say that. That's not to say that your Honor should be the first to extend the Hobbs Act or the New York Penal act to say a breach of fiduciary duty by a board of directors and the possibly aiding and abetting and breach of fiduciary duty should be extortion.

THE COURT: I have two more questions for you and then each of you can have a minute to sum up. I gather it hasn't been touched upon but I gather there is no real argument concerning the adequacy of the plaintiff, assuming he complies with all the technicalities to represent the shareholders?

MR. BLOCK: Your Honor, we moved on that basis prior to the action being instituted in state court. We said in our motion to dismiss that these very plaintiffs are prejudicing the rights of their own class by not suing the people who would be primarily responsible, the board of directors. They have now, subsequent to the filing of our motion, gone to state court with the same

claim. So we are not now saying that what they are doing is not in the best interests of shareholders. What we are saying now is they are doing it in a duplicative fashion.

THE COURT: Not adequate, overly zealous.

MR. BLOCK: Whether they are overly zealous or perfectly adequate we are not disputing. What we are saying is unfair to us is to have to defend the same allegations. Even though they have a different tag on those allegations, they call it aiding and abetting, fiduciary duties in the state court and RICO here in the Federal court, it is the same claim and we are being forced to defend it in two separate places.

THE COURT: Do you have a grievance by virtue of the fact that they chose not to name the board of directors here in Federal court?

MR. BLOCK: I think they played fast and loose with your Honor.

THE COURT: It is troublesome, I will say that. I will ask for a response when you are finished.

MR. BLOCK: They said to themselves, they read the law, they understand that in order to get by the demand requirement, your Honor, your decision today notwithstanding, if they sued the directors that would be a problem. By not suing the directors they assume that maybe the directors – and maybe they talked about it beforehand, maybe the directors did not move to dismiss this action based on the business judgment rule. After we moved on that very ground, then they went into state court and sued the directors as well. I believe they are playing very fast and loose with this court.

THE COURT: Let me ask Mr. Lowey why he didn't sue them and now that he has sued them why he hasn't sought to join them here.

MR. LOWEY: Your Honor, we targeted a case based upon the Hobbs Act which we believe the time as has come based upon Sedima and development of the Hobbs Act, including Capo, we wanted to present a clean issue to your Honor—not to your Honor because we didn't know who the wheel would get. But we filed a complaint and your Honor lucked out and your Honor now has the issue to determine which is, we recognize, an issue of first impression. It is not novel. Its time has come for a decision.

I will not burden anyone in this court with some recitation of learned scholarly views on the matter. But the point is I would love to claim creativity in this area. I would like to claim that I woke up one morning with this brilliant idea. But not so. This is a case that was ready to be brought. And rather than encumbering it with state law pendent claims, breach of fiduciary duty claims, all of which by the way are not easy to win, I have been in such cases before. There is, after all, the Goodrich case in this court.

Judge Walker has sustained a complaint indeed, but there has been no judgment yet at trial. So alleging a breach of fiduciary duty claim and an aiding and abetting claim one is met with the business judgment rule. I needn't tell your Honor. Your Honor has alluded to it. In Delaware, actions of this kind are regularly met with the business judgment rule and very little is left with them absent extreme circumstances.

So it is not a clear shot for a plaintiff to come into court in a greenmail situation and allege breach of fiduciary duty aiding and abetting. Mr. Block can pull the cases right out of his brief case in which those claims have been dismissed on business judgment grounds.

What we chose to do here, not to say that we wouldn't await a Judge Walker-type decision and we do believe that the tendency of the law ought to be in that direction, recognizing that business judgment does not apply in these extreme situations, these fights for survival. These are not normal decisions of

management, but we didn't want to have all that in this court in this complaint. We wanted to present the Hobbs Act issue. We believe we are right. We believe the fact that nobody has said it yet only shows that greenmail is relatively new. RICO only goes back to 1970. It was not tested very much in the early years.

The Hobbs Act goes back to 1940 but everybody thought of it in terms of labor racketeering cases so the law has been developed quite clearly to a point where if the shoe fits, let's try it on. And it does fit here and we submit that certainly – I will go beyond the complaint stage just for a moment because Mr. Block took some liberties with some deposition transcripts. I do want you to know it fits within the facts as we see them. We aren't just being technical. We do believe there is strong evidence to show what Mr. Icahn's intent really was here and we do fully intend to pursue this case to trial.

Again, we believe that Mr. Block will have an opportunity at some point on full record to test out whether or not the Hobbs Act applies to an outstanding eorporate citizen as well as to a labor racketeer. But let's see what the facts are before we test that one upstairs.

Here on this complaint we believe that we are presenting the court with a clean legal issue. We did not wish to give a kitchen sink-type of complaint for the court to deal with here. And that is why we thought better when circumstances arose later – and it wasn't because of Mr. Block. I would not give him credit for forcing us to go to the state court with this complaint. The occasion arose in another context and that is the leveraged buyout context which is also the subject of the state court action for us to do that.

So I would suggest there is only one more matter I want to bring to the court's attention.

THE COURT: Bring it swiftly because the hour is late. You have one minute to bring it to my attention. Mr. Block, you will have two minutes to respond.

MR. LOWEY: One case which we have not put into our brief, and that is the argument that Mr. Block mentions that RICO does not permit us to seek injuctive or injuctive relief. We didn't answer that argument in our brief. I want to give the court a case of Judge Pratt's when he was sitting as a district judge in the Eastern District granted an injunction in a RICO civil case and said that he did not read Section 1964 to exclude injuctive relief where appropriate in other circumstances.

THE COURT: How is it appropriate here?

MR. LOWEY: Only because Mr. Block has moved to strike as part of his motions certain allegations.

THE COURT: Why do you want to maintain, as I understand it if you do want to maintain, any claim for anything other than money damages?

MR. LOWEY: I don't, except for the fact—

THE COURT: Then I think we ought to clean up the act.

MR. LOWEY: I will be glad—I regard it as a nonissue at the moment, absolutely. But if it is stricken I would not want this to be regarded as with prejudice in some other situation that may arise.

THE COURT: Injuctive relief shouldn't be sought after the fact, and frankly, if new facts and circumstances arise in the future which dictate injuctive relief you would not be, in my judgment, bound by some doctrine and be barred from asserting the claim in the future. I must say I did not think that that particularly belonged here and I still don't.

I think you fellows may wish to clean up some loose ends in this case, otherwise we are going to have problems as the discovery proceeds.

I think you have covered your points. I will say to you so that Mr. Block will have a chance to speak, that as I sit here now, although I did not necessarily subscribe to the proposition you have a winning case, I think that your case is sufficient not only to withstand a 12b-6 motion for total dismissal but also probably at least at this juncture to withstand a summary judgment motion, and therefore I would be disposed to suggest that it would be appropriate to proceed to some reasonable discovery here, perhaps on an expedited basis, and to resolve this question on its merits. One of the questions really, at least in my mind as I sit here now, relates to Mr. Icahn's intent.

It seems to me that if he intended a takeover and decided for good and sufficient business reasons to take a premium for his stock, in my judgment he should not be held liable in this lawsuit. On the other hand, if it was his intent to obtain money from this corporation by means which I would characterize as extortionate, then I suggest that there may well be merit to the RICO claim as far as liability is concerned.

I have lots of questions concerning damages. All right, Mr. Block.

MR. KREINDLER: Could I have 30 seconds?

MR. LOWEY: I promised Mr. Kreindler that I would introduce him and I neglected to. Peter Kreindler is a member of the firm Hughes Hubbard & Reed. He is in their Washington office. He is a member of the bar of the District of Columbia, also a member of the bar of the Second Circuit. He informed me just before the proceedings began this afternoon that he has never been admitted in this court and I promised to move his admission and do so now at this time.

THE COURT: That motion is granted.

MR. KREINDLER: Thank you. If I may impose for just 30 seconds. I represent the company, Viacom International, the nominal defendant in this case. I also represent the outside

creditors of the company. Lest there be no misunderstanding, and I think it is clear from our answer, it is the position of the company represented in this case by the board of directors that the acts of the board were completely lawful and were taken in the best interests of the company and were designed at every step of the way, going back to the rights plan that Mr. Block has referred to and the payment for the purchase of Mr. Icahn's shares which is the subject of this action that all of those actions were taken by the directors to maximize the value for the shareholders.

I think as Mr. Block points out, the fact that there are currently offers being made for the company at approximately $95 and $96 a share bears out the fact that the directors' actions were taken in the best interests of the shareholders.

THE COURT: Let me stay with you for one moment. Assume a worse case scenario of liability. What if any damages would have been proximately caused by the alleged wrongdoing?

MR. KREINDLER: Your Honor, I can say this. The decision by the board of directors to purchase Mr. Icahn's shares was based upon advice of independent investment bankers that the company's intrinsic value at that time was between $80 and $100 a share.

THE COURT: Is that advice in written form?

MR. KREINDLER: Yes, it is and it is incorporated into the minutes of the board of directors and it's part of the discovery that has been made available to plaintiffs in this action. Your Honor, I can't testify here, I can only say what has happened to date. What's happened to date is that the company has now received two offers, one of which has been valued at approximately $94 a share, the other one has not been valued yet but there have been public reports that its value is higher. Those offers have been received by the special committee of the board of directors and I just wanted to make sure that there was no misunderstanding on the record that the verified answer that

the company has put in here which states that the actions were taken by the board here and what they perceived to be the best interests of the shareholders, that there is no mistake about that.

THE COURT: Incidentally, since you have risen to speak, I guess you may wish to comment about the fact that you did not join in the motion or assert the lack of a demand on the corporation.

MR. KREINDLER: Your Honor, I think that in part relates to the status of the state court litigation. Your Honor should understand that, contrary to the statement that the directors were not sued until after this case was brought, at the same time that this case was brought there were state court actions brought alleging a breach of fiduciary duty and charging Mr. Icahn with aiding and abetting that breach of fiduciary duty. Those state court actions have not been prosecuted to date.

Subsequent to the announcement of the management buyout there was a new state court action brought in which allegation relating to the management buyout and allegations relating to the greenmail payment were made. But it is incorrect to state that the directors were not sued prior to the most recent suit brought in state court relating to the buyout. The directors were sued originally at the same time that this case was brought in this court.

Your Honor, the directors were advised by counsel of the options available to them in defending the state court actions and the options available to the company in responding to this action, and the decision of the board of directors is duly noted in our verified answer and that is that counsel for the company were directed to file the answer, as your Honor has it before you.

I will note one further thing, your Honor, the question about why the directors were not joined as defendants in this case. There is no basis under Federal law for the alleged victim of an extortion to be charged as a co-conspirator with the person who engages in the extortion.

THE COURT: Yes, I think that's a very valid point. In the extortion situation as opposed to the bribe situation, you are the victim.

MR. KREINDLER: Yes. So I am not here, your Honor, to take the position on whether or not the complaint states a claim. The directors of the company directed us to file the answer that we filed and I leave that to Mr. Lowey on behalf of the company as it were, but nevertheless a lawyer for one of shareholders, and Mr. Block to argue. I do not think the directors could properly be made a party to this action and obviously will vigorously defend the state court action.

MR. BLOCK: If I might. I would like to make what I believe would be helpful suggestions. I believe if your Honor decides the case you would decide it as a case of first impression and I would like you certify one, that the demand issue was on both the directors and the shareholders and, two, the extortion issue on RICO. I think this is something the Second Circuit should hear before you put my client to the expense and aggravation of what is a frivolous action. Mr. Kreindler points out that the stock is worth in the high 80s. My client's calculation were supplied in that case as well and we always thought the stock was valued or worth something in the 80s when we bid 75 and sold it out for something less than 75.

We are being put to two litigations on the same issues simultaneously. We are going to bring in the directors in this case proceeding beyond appeal from your Honor's decision. The case is going to be complicated. Of course, the case is going to take time.

THE COURT: How are you going to claim anything over against the directors? What did they do?

MR. BLOCK: If we are liable, they are liable. They are the ones that forced us to sell.

THE COURT: If the charge is extortion?

MR. BLOCK: Your Honor, if in fact we sold—

THE COURT: Do you really think that you are going to benefit by bringing them in and having each side point fingers at the other in front ever a jury?

MR. BLOCK: The facts are what the facts are, your Honor, and the jury will decide what's right and what is wrong. This case won't be here to see a jury.

THE COURT: The Court of Appeals is not particularly receptive to a 1292 B certification.

MR. BLOCK: Judge Walker did certify the same issue at least as to one point. It seems to me the case shouldn't proceed in this court if it didn't proceed there. I think we have a stronger case.

THE COURT: I suggested before to your adversary that maybe we should consider staying this case pending a determination by the Court of Appeals whether or not they were going to accept certification, which they obviously have to do before the case can go up. That might allay some of your feelings. Or, alternatively, to stay this litigation pending the outcome of the state court proceedings, which seemed to me at the time to be broader. He has rejected that suggestion. You seem to take a contrary position.

MR. BLOCK: Yes. It seems fair to me to be put to the effort of two separate trials on the same issue when I can tell your Honor, and I have no doubt about this, that this matter won't be here for trial. We will spend a lot of time on discovery but we are now seeing in the newspaper the fact that there will be no shareholders at some point in time because of either the leveraged buyout of the third party purchase will deprive Mr. Lowey's client of the very standing he says he has to be here. The law in this circuit is once you are no longer a shareholder you can't assert derivative claim.

I don't want to cry about this but my client is being put to a great deal of dollar expense and effort for a case that it seems apparent to me is not going to be one you are going to try. I think I am entitled to certification if the Goodrich defendants are entitled to it. I have a much better case.

The issue of RICO extortion, I think what your Honor is doing has such ramifications for this court and other courts nationwide that before the floodgates open let's have circuit court review of it. Let the Second Circuit say—

THE COURT: You are an exponent of piecemeal litigation. I am not. That's exactly what it is.

MR. BLOCK: This is a case that cries out for it.

THE COURT: I don't think it cries out for it. If we were talking of a poor widow lady who was putting her last pennies into the defense of an unjust lawsuit, it might start to cry. At this point, I suggest that you wrap it up. We will take a brief recess and then I will tell what's going to be.

MR. BLOCK: I would make the motion now to stay this case pending the outcome in the state court and not to be put to trying two cases on the same issues.

THE COURT: I think we will take a brief recess.

(Recess)

THE COURT: Let me conclude by indicating where I stand at the present time. Turning first to the question of shareholder demand, I think that the case here, in light of the letter, is a stronger case than the Feinberg case which was decided by Judge Walker. My present disposition would be to decide that there was no reason for a demand to have to be made, for a number of reasons which we've covered during the course of this argument. One, of course, being that there had been no request for it by the corporate defendant; the other being the letter.

However, if prior to my rendering a decision the Court of Appeals decides to accept certification from Judge Walker's case, I should like to be apprised of that, and that may change my views, not with reference to the merits of the matter, but with reference to timing.

The other aspect of the case I think presents a closer question. I would be disposed at this point, if I were to conclude as I'm leaning, that the Hobbs Act claim states a claim to certify that question. I hesitate to certify for two reasons. Number one, I am opposed in general to piecemeal litigation; number two, so is the Court of Appeals. However, I recognize that there could very well be a substantial expenditure of time on all sides with reference to the discovery.

Finally, is there ongoing discovery at the present time, or have you been waiting for the decision on this motion?

MR. LOWEY: Your Honor, the discovery that has been proceeding has essentially been related to the state claims. That is to say, there has been no discrete separation of issues in the questioning, but I think the formality of it has been more related to the state claims than to this case.

THE COURT: Would you have any problem about deferring any intensive discovery pending a decision on the motion?

MR. LOWEY: There would be no problem with respect to the Hobbs Act claim. If I may just respond in this case. Mr. Block naturally—

MR. BLOCK: We have a written stipulation stating discovery in this case is stayed pending your Honor's decision. We have a written stipulation.

MR. LOWEY: So I was correct that discovery has proceeded only in the other case.

THE COURT: I appreciate that. As far as I am concerned, we will leave that in place. I will reserve decision.

As I say, my leaning is strong on the demand question for a variety of reasons and probably would not change no matter what the Court of Appeals did on that particular application for interlocutory review. Obviously if they denied it the matter would be relatively academic in view of my belief that the case here is a stronger one.

But I can see the point on the Hobbs Act, so since you have an agreement to stay discovery, I will reserve on the motion and when a decision is forthcoming, and it probably will not be tomorrow, you then, having the advantage of the decision, can make a determination of what you wish to do as far as possibility of an interlocutory appeal.

There is anything further?

MR. BLOCK: No. Do you wish us to still supply you with the cases?

THE COURT: I would appreciate if you would supply the court with the cases that you indicated during argument that you would. They would undoubtedly be helpful. I know the ones you suggested you had and were going to furnish would appear to be the ones with which I may not be familiar and I would be benefitted substantially by anything that you believe appropriate. That would go a little beyond even that. If there is something that occurs to you tomorrow that you think would be helpful in light of the interchanges that we had here, the exchanges that we had, if you would send the court a copy, copying your adversary it would be accepted as a post-argument submission. Decision is reserved.

(Concluded)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD L. ANDERSON , et al .,

Plaintiffs,

against

CARL C. ICAHN, et al.,

Defendants.

NOTICE OF MOTION

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September 27, 1988

The within motion is denied. It is so ordered.

/s/ Robert Ward

U.S.D.J.